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No. 405.

In the Supreme Court of the United States.

OCTOBER TERM, 1906.

VUKO PEROVICH, PLAINTIFF IN ERROR,

v.

THE UNITED STATES.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE THIRD DIVISION OF THE TERRITORY OF ALASKA.

BRIEF FOR THE UNITED STATES.

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STATEMENT.

On July 17, 1905, the plaintiff in error was indicted in the United States District Court of Alaska, Third Division, for the murder of one Jacob Jaconi near the town of Fairbanks. (R., 1.) After a trial the jury on August 5, 1905, found the defendant "guilty of murder in the first degree, and that he suffer death" (R., 15). Motions for a new trial and in arrest of judgment were denied by the court (R., 243), and on September 15, 1905, the defendant was sentenced to be hanged December 8, 1905 (R., 17). To review this judgment a writ of error was sued out from this court.

From the testimony given at the trial it appears that the deceased, who was a fisherman, lived at a fishing camp, a small log cabin covered by a tent, about midway between Fairbanks and Chena, a distance of about 4 miles from each place (R., 25); that on October 28, the last time he was seen alive, he was at Fairbanks between 1 and 2 o'clock in the afternoon (R., 58, 59), and had in his possession several nuggets, a Yukon gold ring, a gold chain and watch charm, and about $800 in money, $500 of which he deposited in a bank at Fairbanks (R., 136). About 4 o'clock in the morning of October 29 the dogs of the deceased were heard barking and two shots from a gun were heard in the direction of his cabin (R., 88). The same day at noon the deceased's partner arrived at his fishing camp and found that the cabin in which the deceased had lived had been partially destroyed by fire. Parts of it were still burning, and in the rear of the tent, where the bunk had been, he saw the back part of a head, a leg bone, and the trunk of a man. The head was sunken on the chest (R., 28). Everything in the cabin was burned except a few chips in and around the stove (R., 47, 53, 73), but the cabin was not wholly destroyed. It was, however, burned more toward the back where the bunk had been (R., 28, 51, 53, 74), and the ground at and near where the bunk had been for an area of about 5 feet and to a depth of 6 or 7 inches, was saturated with oil (R., 91, 93). It was shown that

the deceased had in his cabin between 1½ and 3 gallons of oil (R., 26, 124). The stove was to the left of the door about 8 inches from the side wall and 3 feet from the front of the cabin (R., 26, 74), and in it were some dried chips that had not been burned (R., 53). The stove was 7 to 9 feet from the back of the cabin (R., 74). There was a floor in the cabin running from the door back to the bunk, but under the bunk itself there was no floor (R., 26). Six witnesses testified that they were at the cabin either October 29 or 30, and saw the skull and other parts of the skeleton, and that they were still smoking, and that the bones were burned so that they crumbled to pieces when touched (R., 28, 37, 39, 42–47, 52, 55). Three weeks before the tent was burned the defendant, in a saloon at Fairbanks, said he was "broke" (R., 41, 42), and a week later, while in a saloon in the same place, he told another witness he was broke, but that he could get some money if he had a partner, as he knew a man who lived about 5 miles from Chena who had about $500, a watch and chain, a ring, and a gun (R., 96). At the same time the defendant made a similar statement to another witness, and asked the witness to go with him, saying that he would steal the money (R., 99–101). On October 15 defendant had been at deceased's cabin about daylight. When asked what he wanted he said he was traveling, looking for a job. He remained at the cabin for

about two hours, ate his breakfast, and then started toward Chena. When he had gone a short distance he turned and looked back, and took a short crosscut toward Fairbanks, and was seen at Fairbanks at 9 o'clock the same morning (R., 29, 30). Another witness testified that on the evening of October 20, 1904, he and the defendant went to Chena together. On the way they stopped at the cabin of deceased. Defendant went up to the door and inquired the distance to Chena, and was told it was 4 miles. He told witness that he had been there several times before; that the deceased had a roll of money—a thousand or fifteen hundred dollars—and that he would "lick him with an ax" some day and throw him in the water, or that he would make a fire and burn everything up (R., 103–105). On October 28 at 7 o'clock in the evening defendant was at Fairbanks and said he was going to the cabin of one of his countrymen to see if he could find anything in it (R., 57, 117). On October 29 between half past 3 and 4 o'clock in the afternoon he arrived at the camp about 20 miles below Chena (R., 59, 60). He wore a corduroy coat and vest, overalls, and a fur cap (R., 61). He said he had no money, clothes, or food. He had a rifle and a canvas bag (R., 62). Another witness testified that the defendant had a Yukon ring initialed "T. M." and a gold watch and chain. Defendant had said that he paid $30 for the watch and bought

the ring from a friend at Dawson for $8 (R., 66). To still another witness he tried to sell a suit of clothes which he said his brother in Dawson had given him. He also had an overcoat and many other articles of clothing (R., 68). To another witness defendant said he had won the watch in a raffle at Douglass (R., 86). He was arrested on November 5, 45 miles below Chena and at first gave his name as Charlie Mitchell. He had in his possession a twenty-dollar gold piece, a ten-dollar gold piece in a pocketbook, a twenty-dollar Canadian bill and a gold watch. Later a bag of clothes was found where he had left it. Defendant said he had traded a nugget chain with two men for the sack of clothes and the watch, and that they had given him $11.50 in money; that he and his partner had made the chain, and he had bought his partner's interest in it (R., 76, 77). The partner of the defendant, above referred to, testified that he and the defendant had owned a nugget chain and that it had never been out of his possession after it was made (R., 119). The articles above referred to, and many others which were found in defendant's possession, were identified as the property of the deceased (R., 122–139). On cross-examination the defendant admitted that the statements he had made to the different witnesses on different occasions as to the manner in which he acquired the various articles subsequently identified as having belonged to the deceased, were all false. He gave

as a reason for this that he feared that otherwise it would be thought he had stolen the articles (R., 192, 193).

ARGUMENT.

A. EXCEPTIONS TO CHARGE TO THE JURY.

The defendant excepted to the charge to the jury on the following grounds (R., 241):

> The defendant excepts to the ruling of the court to the effect that exception to his instructions to the jury in this case should be taken at this time in the presence of the jury, and to the refusal of the court to allow defendant additional time in which to prepare his exceptions to said instructions, for the reason that such ruling is contrary to law and prejudicial to the rights of the defendant.
>
> The defendant excepts to the refusal of the court to give to the jury the instructions requested by the defendant upon the matter of the proof of the corpus delicti, and the defendant also excepts to the refusal of the court to give to the jury in this case the instructions offered and requested by the defendant upon the question and regarding the matter of reasonable doubt in this case.
>
> The defendant excepts to the instructions of the court to the jury in this case upon the question and regarding the matter of reasonable doubt for the reason that such instructions so given by the court are con-

trary to law, and do not state the law, and are prejudicial to the rights of the defendant.

The second and third grounds of exception will be fully covered hereafter in connection with the argument on the assignments of error. It is, therefore, only necessary to consider the first exception at this time.

The orderly trial of criminal cases would be impossible if the rule of practice contended for in the defendant's first exception were adopted. It is settled law that exceptions to the charge should be taken before the jury retires in order that the court may correct any error that may have been made. (*Norman* v. *United States*, 20 App. D. C., 494.)

B. ASSIGNMENTS OF ERROR.

1. The action of the court in denying the following motion is assigned as error:

> The defendant moves the court to now instruct the jury to bring in a verdict of not guilty against this accused for the reason that the corpus delicti has not been proved; that the evidence adduced on the trial is not sufficient to justify a verdict of guilty against this defendant; that if anything has been proved by the prosecution it is simply corpus alone; that the evidence in no way connects this defendant with the death of Jacob Jaconi; that the evidence as adduced by the trial does not support the indictment as returned by the grand jury, and that the law and the evidence will not support a conviction.

This motion was made after the Government rested its case. It was then denied and an exception allowed. The defense then put in its evidence and the motion was not subsequently renewed.

It has been repeatedly held by this court that when after such a motion the defendant introduces testimony, an exception to the action of the court in refusing to direct a verdict is waived. (*Union Pacific R. R.* v. *Daniels*, 152 U. S., 684, and authorities there cited; *Runkle* v. *Burnham*, 153 U. S., 216, and *Hansen* v. *Boyd*, 161 U. S., 397.)

2. It is complained that the court erred in overruling the following motion made by the defendant when the Government rested its case:

> The defendant moves that the evidence given by George Dreibelbis, deputy marshal, regarding the conversation held with the accused after his arrest, the conversation that was held with him by George Dreibelbis on the trail, the conversation that was held between George Dreibelbis and the accused at the time Edgar Wickersham was present, and that all conversations that were held with defendant by George Dreibelbis be stricken from the record.

The grounds upon which this request was based were not stated. The motion, therefore, was properly overruled.

Camden v. *Doremus* (3 How., 515).
United States v. *McMasters* (4 Wall., 680).
Burton v *Driggs* (20 Wall., 125).
Toplitz v. *Hedden* (146 U. S., 252).

No objection was made to the testimony in chief of George Dreibelbis (R., 72–78). In the course of his testimony in rebuttal, counsel for defense interposed an objection whereupon the following dialogue took place:

> COURT. Upon what grounds, Mr. Tozier?
> Mr. TOZIER. It takes the form of an admission. If it is anything it is an admission and it has no place in the record.

The objection was thereupon overruled and an exception allowed (R., 216).

This objection is so vague as to render it difficult for the prosecution to cure a possible defect. It is therefore unavailing.

> *District of Columbia* v. *Woodbury* (136 U. S., 450).
> *Patrick* v. *Graham* (132 U. S., 627).
> *Wood* v. *Weimar* (104 U. S., 786).
> *Noonan* v. *Caledonia Mining Co.* (121 U. S., 393), and cases cited above.

If the foregoing statement of counsel for the defense be regarded as sufficiently specifying the ground of his objection to this testimony, then he must be held to have waived all others. (*Evanston* v. *Gunn*, 99 U. S., 660.)

The evidence shows that no threats or promises were made as an inducement to the defendant to make a statement.

An admission of a fact not in itself involving criminal intent is not to be rejected as evidence

merely because it may, when taken in connection with other facts, tend to establish guilt.

People v. *Velarde* (59 Cal., 457).
State v. *Red* (53 Ia., 69, 74).
People v. *Parton* (49 Cal., 632).
Ferguson v. *State* (31 Tex. Crim. Rep., 93).
People v. *McCallum* (103 N. Y., 587, 596).

3. Error is alleged in the refusal of the court to appoint an interpreter when the defendant was called as a witness.

No objection was taken to the ruling of the court sustaining the objection of the district attorney to the appointment of an interpreter, and it will be seen, by reference to the defendant's testimony (Rec., pp. 143–207), that an interpreter was unnecessary. The defendant evidently understood the questions that were asked him and answered them intelligently. Moreover, whether or not the appointment of an interpreter is necessary is within the sound discretion of the trial court.

Schall v. *Eisner* (58 Ga., 190).
State v. *Severson* (78 Ia., 653).

4. It is assigned as error that the court erred in overruling the defendant's motion in arrest of judgment because the indictment did not state facts sufficient to constitute a crime (R., 242).

The indictment reads as follows:

The United States of America, plaintiff, *v.* Vuko Perovich, defendant.	No. 104. Indictment.

Vuko Perovich is accused by the grand jury of the Territory of Alaska, Third Division, by this indictment, of the crime of murder in the first degree, committed as follows:

That Vuko Perovich, in the Territory of Alaska, third division thereof, and within the jurisdiction of this court, to wit, near the town of Fairbanks therein, on the 29th day of October, A. D. 1904, unlawfully, willfully, feloniously, purposely, and of deliberate and premeditated malice killed one Jacob Jaconi, by means unknown to the grand jury, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the United States of America.

Dated at Fairbanks, in said division, the 17th day of July, A. D. 1905.

Nathan V. Harlan, United States attorney.

The indictment, which follows the language of the statute, viz:

> That whoever, being of sound mind and discretion, purposely, and either of deliberate or premeditated malice, or by means of poison * * * kills another is guilty of

> murder in the first degree, and shall suffer death,

is in accordance with the form prescribed by sections 39 and 40, chapter 7 of the Criminal Code of Alaska, and section 1 of the Appendix therein referred to (30 Stat., 1289, 1341).

The manner in which the murder was accomplished and the means employed could not be ascertained, and as it is merely matter of description the indictment is good if it states that they are unknown to the grand jury.

> *State* v. *Wood* (53 N. H., 484).
> *State* v. *Williams* (7 Jones, N. C., 446).
> *Commonwealth* v. *Ashton* (125 Mass., 384).
> *Commonwealth* v. *Martin* (125 Mass., 394).
> *Commonwealth* v. *Webster* (5 Cush., 295).
> *People* v. *Taylor* (3 Denio, 91).

5. It is claimed in the fifth assignment of error that the court erred in overruling the defendant's motion for a new trial upon the grounds therein stated.

Nothing is better settled than that a motion for a new trial is always addressed to the discretion of the court and will not be reviewed by an appellate court.

> *Addington* v. *United States* (165 U. S., 185)
> *Blitz* v. *United States* (153 U. S., 308–312).
> *Smith* v. *Mississippi* (162 U. S., 592).

6. It is alleged in the sixth assignment of error that the court erred in refusing to grant the following instruction:

> It is a general rule not to convict unless the corpus delicti can be established, i. e., until the fact that a crime has been actually perpetrated has been first proved; hence, in the charge of homicide the accused should not be convicted unless the death be first distinctly proved, either by direct evidence of the fact or by inspection of the body. Corpus delicti means the body of the offense, the essence of the crime. There must be clear and unequivocal proof of the corpus delicti. It is an established rule that the facts which form the basis of the corpus delicti are to be proved either by direct evidence or by circumstantial evidence of the most cogent and irresistible kind. Corpus delicti does not mean simply the dead body itself; it involves the element of crime; and upon a charge of homicide, producing the dead body does not establish the corpus delicti; it would simply establish the corpus. And in the case of felonious homicide, the corpus delicti consists of two substantial facts, first, the fact of the death of deceased, and, second, the fact of the existence of criminal agencies as the cause of the death. In all trials for crime the prosecution must prove to the satisfaction of the jury and beyond reasonable doubt the corpus delicti.

It is not the law that the corpus delicti "must be distinctly proved, either by direct evidence of the fact or by inspection of the body," because that would eliminate proof of the corpus delicti by circumstantial evidence.

Commonwealth v. *Webster* (5 Cush., 295).
State v. *Williams* (7 Jones (N. C.), 446).

Moreover, the defendant was not entitled to this instruction in the precise terms prayed, and the court properly refused it.

Catts v. *Phalen* (2 How., 376).
Robeson v. *Parker* (11 Appls. D. C., 132).

This prayer was also fully covered in the following part of the court's charge to the jury:

> You are instructed that every criminal charge involves two distinct propositions; first, that a crime has been committed; second, that the guilt of such act attaches to the particular person charged with the commission of the offense. Each of these facts must be proved beyond a reasonable doubt, either by direct testimony or by presumptive evidence of the most cogent and irresistible kind. The proof in both cases must be clear and distinct, but it is not necessary that it should be direct or positive; both facts may be established by circumstantial evidence, and in this case you are instructed that there are two distinct propositions involved in the charge against the defendant, both of which you must find beyond reasonable doubt against the defendant or you can not find

him guilty. The first is that a criminal act of homicide has been committed by the killing of Jacob Jaconi; and the second is that the defendant killed him at the time and place mentioned in the indictment. Each of these facts must be proved beyond a reasonable doubt, either by direct testimony or circumstantial evidence of the most cogent and irresistible kind.

And as the law was here clearly stated to the jury, it was not error to refuse the instruction.

Coffin v. *United States* (162 U. S., 664).

Grand Trunk R. R. Co. v. *Ives* (144 U. S., 408).

Erie Ry. v. *Winter* (143 U. S., 60–74).

7. The seventh assignment of error charges that the court erred in refusing to grant the following instruction:

> The law, where a criminal case is tried before a jury, contemplates the concurrence of twelve men in the conclusion of guilt before a conviction can be had. A juror must be satisfied beyond a reasonable doubt of the defendant's guilt before he can under his oath consent to a verdict of guilty, and if any juror, after having duly considered all the evidence and after having consulted with his fellow jurymen, entertain any such reasonable doubt, the jury can not in such case find the defendant guilty.

This prayer is fully covered in the following part of the court's charge to the jury:

> Your duty to society and to this defendant requires *each* of you to give your most earnest and careful consideration to every feature of the case, so that the prisoner may not be unjustly convicted or unworthily acquitted. (R., 227–228.)
>
> * * * This presumption of innocence remains with the defendant and should be given full force and effect until such time in the progress of the trial as you are convinced of guilt from the evidence beyond a reason-doubt. (R., 229.)
>
> * * * In conformity with the law I have provided five forms of verdict, which you will take with you into the jury room, and when you shall have unanimously agreed upon your verdict you will sign by your foreman that form to which you agree and return it to the court as your verdict; the other forms you will destroy. (R., 241.)

8. It is claimed in the eighth assignment of error that the court erred in refusing to grant a prayer made by the defendant on the question of reasonable doubt, and in the eleventh assignment that the court erred in its instructions to the jury upon that question.

The court charged the jury as to reasonable doubt in the following language:

> The term "reasonable doubt" is often used, probably well understood, but not

easily defined. It is not a mere possible doubt; because everything relating to human affairs and depending on moral evidence is open to some possible or imaginary doubt. A reasonable doubt is that state of the case which, after an entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they can not feel an abiding conviction, to a moral certainty, of the truth of the charge. The burden of proof is upon the prosecutor. All the presumptions of law independent of evidence are in favor of innocence; and every person is presumed to be innocent until he is proven guilty. If upon such proof there be reasonable doubt remaining, the accused is entitled to the benefit of it by an acquittal. For it is not sufficient to establish a probability, though a strong one arising from the doctrine of chances, that the fact charged is more likely to be true than the contrary; but the evidence must establish the truth of the fact to a reasonable and moral certainty—a certainty that convinces and directs the understanding and satisfies the reason and judgment of those who are bound to act conscientiously upon it. This we take to be proof beyond reasonable doubt; because if the law should go further than this and require absolute certainty, as it mostly depends upon consideration of a moral nature, it would exclude circumstantial evidence altogether.

This instruction is taken verbatim from the charge of Chief Justice Shaw to the jury in *Commonwealth* v. *Webster* (5 Cush., 320), and is cited with approval in *Miles* v. *United States* (103 U. S., 312).

9. The ninth assignment alleges error in the court refusing to give this instruction:

> The fact of an accused having passed by or having been seen near the premises where the remains of a human being were found about the time the crime is supposed to have been committed raises no presumption of the guilt of the accused.

The fact that the defendant was known to be near the place of the crime at the time the murder is supposed to have been committed is to be considered not separately but in connection with the other facts in the case. The court was therefore right in refusing to grant the instructions asked for.

Scott v. *Lloyd* (9 Pet., 418, 459).
Coffin v. *United States* (162 U. S., 664, 675).

10. It is complained in the tenth assignment of error that the court erred in refusing to charge the jury that—

> The fact that Jacob Jaconi has not been seen since the 28th day of October, 1904, does not create a presumption of his death. In homicide the fact of death should be shown either by witnesses who were present when the murderous act was done, or by proof of the body having been seen dead; or at all

events that fragments of it, if in a state of decomposition or disintegration, should be identified.

This is not the law, as it would exclude the proof of corpus delicti by circumstantial evidence, and is a request of the court to charge the jury upon a part of the evidence only.

It is respectfully submitted that the judgment of the District Court should be affirmed.

ALFORD W. COOLEY,
Assistant Attorney-General.

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